

NO. 83-6459

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOHNNY LUKE,

Petitioner

V.

STATE OF ALABAMA,

Respondent

RECEIVED

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SUPREME COURT, U.S.

ON PETITION FOR WRIT OF CERTIORARI
TO THE ALABAMA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION
TO CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court grant certiorari where the question of the sufficiency of the evidence to convict is essentially a question of state law? (No)

2. Should this Court grant certiorari where the question of the sufficiency of the evidence to prove an aggravating circumstance is essentially a question of state law? (No)

3. Should this Court grant certiorari where the question of whether the imposition of the death penalty for this type of crime violates the Eighth Amendment has been conclusively decided against the Petitioner by previous decision of this Court? (No)

4. Should this Court grant certiorari where the question regarding the alleged arbitrary application of the Alabama capital punishment statute has been conclusively decided against the Petitioner by previous decision of this Court? (No)

PARTIES

The caption contains the names of all parties in the courts below.

TABLE OF CONTENTS

	<u>PAGE</u>
QUESTIONS PRESENTED FOR REVIEW.....	1
PARTIES.....	1
TABLE OF AUTHORITIES.....	111
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	1
STATEMENT OF THE CASE.....	2
SUMMARY OF ARGUMENT.....	5
ARGUMENT:	
I. THE ISSUE OF WHETHER THE EVIDENCE OF AN ATTEMPT TO ROB WAS SUFFICIENT TO CONVICT UNDER CODE OF ALABAMA 1975, SECTION 13A-5-40(a)(2) IS ESSENTIALLY A QUESTION OF STATE LAW. THUS THIS COURT SHOULD NOT GRANT CERTIORARI AS TO THIS ISSUE.....	5
II. THE ISSUE OF WHETHER THE EVIDENCE OF AN ATTEMPT TO ROB WAS SUFFICIENT TO PROVE THE EXISTENCE OF THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER OCCURRED DURING AN ATTEMPT TO ROB IS ESSENTIALLY A QUESTION OF STATE LAW. THUS THIS COURT SHOULD NOT GRANT CERTIORARI AS TO THIS ISSUE.....	6
III. THE PETITIONER'S SENTENCE OF DEATH FOR MURDER DURING THE COURSE OF AN ATTEMPT TO ROB DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.....	7
IV. THE PETITIONER'S EQUAL PROTECTION ARGUMENT IS FORECLOSED BY THIS COURT'S DECISION IN <u>GREGG V. GEORGIA</u>	8
CONCLUSION.....	9
CERTIFICATE OF SERVICE.....	10

TABLE OF AUTHORITIES

PAGE

CASES

<u>Barclay v. Florida</u> , ____ U.S. ____, 77 L.Ed.2d 1134 (1983).....	5,6,7
<u>Ex parte Luke</u> , 444 So.2d 400, 401 (Ala. 1983).....	6,7
<u>Fuller v. Oregon</u> , 417 U.S. 40, 50 n. 11 (1974).....	
<u>Furman v. Georgia</u> , 408 U.S. 238 (1972).....	8
<u>Gregg v. Georgia</u> , 428 U.S. 153, 186 & 187 (1976)....	7,8
<u>Luke v. State</u> , 444 So.2d 393, 396 (Ala.Crim.App. 1983).....	6,7
<u>Moore v. Illinois</u> , 408 U.S. 786, 799 (1972).....	6
<u>Street v. New York</u> , 394 U.S. 576, 581-582 (1969).....	6

STATUTES:

<u>Code of Alabama 1975</u> , §13A-6-2.....	8
<u>Code of Alabama 1975</u> , §13A-5-40.....	8
<u>Code of Alabama 1975</u> , §13A-5-40(a)(2).....	5

OTHER AUTHORITY:

28 U.S.C. §1257(2) and (3).....	6
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OPINIONS BELOW

1. The opinion of the Alabama Court of Criminal Appeals affirming the Petitioner's conviction and death sentence is Luke v. State, 444 So.2d 393 (Ala.Crim.App. 1983).

2. The opinion of the Alabama Supreme Court affirming the decision of the Court of Criminal Appeals is Ex parte Luke, 444 So.2d 400 (Ala. 1983).

JURISDICTION

The decision of the Alabama Supreme Court from which the Petitioner seeks relief was entered on September 30, 1983, and the Petitioner's timely application for rehearing was overruled on December 22, 1983. On March 9, 1984, this Court extended through March 21, 1984, the time within which the Petitioner could file a petition for writ of certiorari. On March 20, 1984, the Petitioner filed in this Court a petition for writ of certiorari.

This Court has jurisdiction pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petition raises issues involving the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

The statute under which the Petitioner was indicted and convicted, Code of Alabama 1975, §13A-5-40(a)(2), provides as follows:

(a) The following are capital offenses:

* * *

(2) Murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant;

STATEMENT OF THE CASE

The facts of the crime, as found by the trial court in its sentencing order, are as follows:

At approximately 7:00 A. M., Central Daylight Time, on Friday, July 23, 1982, defendant was awakened by George Warren. Warren wanted defendant to help him load watermelons onto his El Camino pickup truck. They went to the house of Alice Starke, Warren's girlfriend, and loaded watermelons until 8:30 A. M. They then went to the house of Lucille Goode and they left several watermelons. Thereafter they went to the trailer of Warren in rural Russell County. At approximately 12:30 P. M. on that same day, Warren and defendant decided to rob the store of James T. Hughes in Hurtsboro, Russell County, Alabama. They traveled to the store in Warren's pickup and arrived there at approximately 1:30 P. M. Warren went inside first and purchased two cans of beer. By that time defendant had entered the store armed with a five-shot .38 caliber revolver. This weapon belonged to Warren and had been in defendant's possession for approximately a week. James T. Hughes was behind the counter upon which a cash register was placed. After Hughes made change for Warren's purchase, defendant fired the pistol four times. All four bullets struck Mr. Hughes. He was struck in the face, the upper left arm, the right forearm, and the upper right chest. This last bullet traveled through his body, severing the vena cava to the heart and caused substantial damage to the liver. After being discovered, he was transported to Cobb Memorial Hospital in Phenix City, Alabama, where he died in surgery. Two bullets were recovered from the body of Mr. Hughes. These bullets were fired from the pistol which was later found in the trailer of George Warren. The death of Mr. Hughes was caused by a gunshot wound to his chest. Mr. Hughes was first discovered by Jimmy Lee Berry, who summoned aid. Mr. John T. Smith was one of the persons giving assistance to Mr. Hughes. Mr. Hughes said several times, "John T., I'm not going to make it." Hurtsboro Police Chief Richard Roynon asked Mr. Hughes who shot him. Mr. Hughes responded by saying, "That Luke boy and George Warren was with him."

After the shooting Warren and defendant left the premises. Warren drove the pickup truck to his residence. While enroute defendant removed four spent shells and threw them out the window. Warren went inside his trailer with the pistol and left it there. This pistol was later recovered pursuant to a valid search warrant.

From Warren's trailer they drove to the house of Alice Starke and borrowed her car. The pickup truck was left in the yard. The defendant and George Warren went to the grocery store of Frank Hendricks in Hurtsboro, Alabama, where Warren bought several items. On the way back to Warren's residence they were apprehended by deputies of the Russell County Sheriff's Department. At that time defendant made a voluntary statement, after waiving his rights under the constitutions of the United States and Alabama. Defendant told Deputy Sheriff B. J. Ammons that Warren and he had decided that morning to go to the store of Mr. Hughes and rob him. He said they went to the store and Hughes "gave them trouble." Defendant said he shot Hughes four times. Later that evening, at 5:00 P. M., at the Hurtsboro police department, the defendant said in a voluntary statement, after waiving his constitutional rights, that he and Warren went to Hughes' store. Defendant shot Hughes four times. Defendant also stated that he did not intend to rob Mr. Hughes. At 11:04 P. M. that same night, defendant made another voluntary statement, after waiving his constitutional rights. Defendant said he and Warren decided about 12:30 P. M. to rob Mr. Hughes' store because Hughes "had money there." Defendant said that after Warren purchased some beer he (defendant) started shooting. Defendant said he was going to get money after he shot Hughes but that he didn't because he "changed his mind."

On July 25, 1982, in another voluntary statement after waiving his constitutional rights, defendant said he shot Mr. Hughes. This statement was tape-recorded. Investigator Thomas Boswell testified at trial that after the voluntary waiver of constitutional rights and before the statement was recorded, defendant was asked if robbery was the motive. Investigator Boswell testified that defendant responded in the affirmative.

The Petitioner was indicted on August 25, 1982, by the Grand Jury of Russell County, Alabama, on the charge of Murder during a Robbery in the First Degree (R. 429 & 430). On September 8, 1982, the Petitioner was arraigned and pleaded not guilty (R. 434). On September 13, 1982, the Petitioner filed a petition for psychiatric examination (R. 439-441); after hearing, this petition was denied (R. 444).

Trial by jury commenced on September 29, 1982; on September 30, 1982, after hearing the evidence, the jury found the Petitioner guilty as charged in the indictment (R. 462). The Petitioner waived the participation of the jury in the sentencing phase of the trial (R. 401). On October 1, 1982, a sentencing hearing was held (R. 404-416). After a pre-sentence report was considered by the trial court (R. 417-420), the Petitioner was sentenced to death on October 29, 1982 (R. 425). The case was automatically appealed to the Alabama Court of Criminal Appeals.

On March 1, 1983, the Petitioner's conviction and sentence were affirmed by the Alabama Court of Criminal Appeals. An application for rehearing was filed on March 14, 1983, and denied on March 29, 1983.

Petition for certiorari was granted by the Alabama Supreme Court as a matter of right on April 29, 1983. On September 30, 1983, the Alabama Supreme Court affirmed the decision of the Alabama Court of Criminal Appeals. The Petitioner's application for rehearing was denied on December 22, 1983.

On February 3, 1984, the Petitioner filed in this Court a motion for extension of time within which to file a petition for writ of certiorari, and on March 9, 1984, this Court extended this time through March 21, 1984. On March 20, 1984, the Petitioner filed in this Court a petition for

writ of certiorari. On April 16, 1984, this Court stayed the scheduled execution of the Petitioner pending consideration of his petition for writ of certiorari.

SUMMARY OF ARGUMENT

The Petitioner's issues as to the sufficiency of the evidence of an attempt to rob are essentially questions of state law which this Court need not address. These questions were correctly decided by the courts below.

The Petitioner's argument that the imposition of the death penalty for murder during an attempt to rob violates the Eighth Amendment is foreclosed by this Court's decision in Gregg v. Georgia, 428 U.S. 153 (1976).

The Petitioner's equal protection argument is foreclosed by this Court's decision in Gregg v. Georgia, *supra*.

ARGUMENT

- I. THE ISSUE OF WHETHER THE EVIDENCE OF AN ATTEMPT TO ROB WAS SUFFICIENT TO CONVICT UNDER CODE OF ALABAMA 1975, SECTION 13A-5-40(a)(2), IS ESSENTIALLY A QUESTION OF STATE LAW. THUS THIS COURT SHOULD NOT GRANT CERTIORARI AS TO THIS ISSUE.

The Petitioner argues that the evidence of an attempt to rob was insufficient to warrant conviction of the capital offense of robbery/murder under Code of Alabama 1975, §13A-5-40(a)(2). While the Petitioner invokes the authority of the Fifth and Fourteenth Amendments, the question presented is essentially one of state law. This Court does not concern itself with errors of state law. Barclay v. Florida, ____ U.S. ____, 77 L.Ed.2d 1134, 1149 (1983).

Moreover, the Alabama appellate courts have correctly determined that the Petitioner's admissions of an intent to rob, when considered in conjunction with the circumstances of the crime, provide sufficient evidence that the murder took place during an attempt to rob. Luke v. State, 444 So.2d 393, 396 (Ala.Crim.App. 1983); Ex parte Luke, 444 So.2d 400, 401 (Ala. 1983).

For the above reasons, the Court should deny certiorari as to this ground.¹

II. THE ISSUE OF WHETHER THE EVIDENCE OF AN ATTEMPT TO ROB WAS SUFFICIENT TO PROVE THE EXISTENCE OF THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER OCCURRED DURING AN ATTEMPT TO ROB IS ESSENTIALLY A QUESTION OF STATE LAW. THUS THIS COURT SHOULD NOT GRANT CERTIORARI AS TO THIS ISSUE.

The Petitioner argues that the evidence that the murder took place during an attempt to rob was insufficient to prove this as an aggravating circumstance, and thus that the death penalty is inappropriate in this case. This question is essentially one of state law. This court does not concern itself with errors of state law. Barclay v. Florida, supra.

¹ The Petitioner states in brief that "it was shown that the defendant was frightened of the law enforcement officers and that the circumstances surrounding his first statement were unusually intimidating." Petitioner's brief, p. 6. No contention that the Petitioner's statements were inadmissible was made in the appellate courts below. (Exhibit A, copies of Petitioner's briefs filed in the Alabama Supreme Court and Court of Criminal Appeals.) Neither was this issue addressed by the Alabama appellate courts. Luke v. State, 444 So.2d 393 (Ala.Crim.App. 1983); Ex parte Luke, 444 So.2d 400, (Ala. 1983). Because the Petitioner did not present this issue to the state appellate courts below and it was not decided by them, this Court need not decide it. Moore v. Illinois, 408 U.S. 786, 799 (1972), should not decide it, Fuller v. Oregon, 417 U.S. 40, 50 n. 11 (1974), and has no jurisdiction to decide it, Street v. New York, 394 U.S. 576, 581-582 (1969); See, 28 U.S.C. §1257(2) and (3).

Moreover, the Alabama appellate courts have correctly determined that the Petitioner's admissions of an intent to rob, when considered in conjunction with the circumstances of the crime, provide sufficient evidence that the murder took place during an attempt to rob. Luke v. State, 444 So.2d 393, 396 (Ala.Crim.App. 1983); Ex parte Luke, 444 So.2d 400, 401 (Ala. 1983). Review of this finding as to an aggravating circumstance is limited to the question of whether it is so unprincipled or arbitrary as to somehow violate the United States Constitution. Barclay v. Florida, ____ U.S. ____, 77 L.Ed.2d 1134, 1142 (1983). Because this finding was not unprincipled or arbitrary it should be affirmed.

For the above reasons, certiorari should be denied as to this issue.

III. THE PETITIONER'S SENTENCE OF DEATH
FOR MURDER DURING THE COURSE OF AN
ATTEMPT TO ROB DOES NOT CONSTITUTE
CRUEL AND UNUSUAL PUNISHMENT.

The Petitioner argues that his sentence of death for the offense of murder during an attempt to rob constitutes cruel and unusual punishment. This Court has previously determined that the imposition of the death penalty for the crime of murder does not constitute cruel and unusual punishment. Gregg v. Georgia, 428 U.S. 153, 186 & 187 (1976). Thus a death sentence for murder plus an aggravating circumstance cannot be unconstitutionally cruel and unusual.

IV. THE PETITIONER'S EQUAL PROTECTION
ARGUMENT IS FORECLOSED BY THIS
COURT'S DECISION IN GREGG V. GEORGIA.

The Petitioner argues that the fact that he could have been prosecuted under Code of Alabama 1975, §13A-6-2, the Alabama murder statute, or Code of Alabama 1975, §13A-5-40, the Alabama capital murder statute, violates equal protection. A similar argument based upon the Eighth Amendment was rejected by this Court in Gregg v. Georgia, 428 U.S. 153 (1976). In Gregg, the defendant argued that the existence of prosecutorial discretion as to whether an accused would be charged with capital murder or a lesser degree of homicide rendered Georgia's capital punishment scheme unconstitutional as arbitrary and capricious in violation of Furman v. Georgia, 408 U.S. 238 (1972). This Court rejected this argument. Gregg v. Georgia, *supra*, 199, 224 & 225 (1976). Because the argument in Gregg as to arbitrariness and capriciousness due to prosecutorial discretion is similar to the Petitioner's argument here, the Court should reject this argument based upon Gregg. Thus the Court should not grant certiorari as to this issue.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE


I, William D. Little, a member of the bar of the Supreme Court of the United States, do hereby certify that I did serve copies of this brief on the Petitioner by placing said copies in the United States mail, postage prepaid, and properly addressed to his counsel of record as follows:

Honorable Margaret Young Brown
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I further certify that I have served all parties required to be served.

DONE this 20th day of April, 1984.


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ATTORNEY FOR RESPONDENT

MAR 14 1983

IN THE COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

JOHNNY LUKE,

Appellant

vs.

THE STATE OF ALABAMA,

Appellee

CASE NO. 4 Div. 98

APPLICATION FOR REHEARING

BRIEF OF APPELLANT

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TABLE OF CONTENTS

APPLICATION FOR HEARING	PAGE 1
TABLE OF AUTHORITIES	2
ARGUMENT I	3-4
CERTIFICATE OF SERVICE	5

IN THE COURT OF CRIMINAL APPEALS

STATE OF ALABAMA

JOHNNY LUKE,

Appellant

vs.

STATE OF ALABAMA,

Appellee

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CRIMINAL COURT

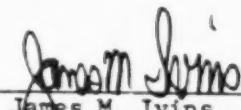
CASE NO 4 Div. 98

APPLICATION FOR REHEARING

Comes now the Appellant and makes this his application for rehearing and in support of such application attaches his brief.

CORNETT, PERDUE & IVINS

By:



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TABLE OF AUTHORITIES

CASE

PAGE

Code of Alabama, 1975 §13A-4-2

3

ARGUMENT

I.

THE APPELLATE COURT COMMITTED ERROR WHEN IT REFUSED TO REVERSE DEFENDANT'S CONVICTION.

A. The Trial Court made a "finding of fact" which was adopted by Appellate Court. The Trial Court's finding of fact was not correct and should not be used as the basis of affirming Appellant's conviction. Determining the facts is a function for the jury. The Appellate Court has a duty to review the facts by examining the record of the trial proceedings and by not merely adopting the Trial Court's rendition of the evidence.

B. The facts do not support a conviction of a capital offense. There is no direct evidence of a theft of property from the victim. There was also no direct evidence that the victim was shot "in the course of committing a theft" as defined by the statute. The Trial Court's findings concerning the aggravating circumstance is not fully supported by the evidence, therefore, the sentence of death is not proper.

C. The Code of Alabama, 1975 §13A-4-2 directs a lesser punishment for an attempt than for the commission of the uncompleted underlying charge. Assuming that the underlying charge was a Class A felony, then punishment for an attempt thereof could not be greater than a Class B felony, or two (2) to twenty (20) years. In effect, the Appellant has been sentenced to death for a charge that would ordinarily be punishable for a term not to exceed twenty (20) years. Therefore, in this case, the death penalty is a cruel and unusual punishment prohibited by the 8th and 14th Amendments to the Constitution of the United States.

D. The death sentence is not the proper sentence under the evidence.

The sentence of death is excessive and disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and this Defendant-Appellant. The sentence of death was imposed under the influence of passion and prejudice. The Trial Court committed several errors which has adversely affected Appellant's substantial rights.

The Defendant's conviction must be reversed.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Brief upon the Clerk of the Court of Criminal Appeals and to the Attorney General of the State of Alabama, by depositing a copy of the same, postage prepaid, certified mail, return receipt requested and properly addressed to:

Hon. Mollie Jordan
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Hon. Charles Graddick
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This the 14th day of March, 1983.

CORNETT, PERDUE & IVINS

By: _____

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1-4-83

IN THE COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

JOHNNY LUKE,

Appellant

vs.

THE STATE OF ALABAMA,

Appellee

CASE NO. 4 Div. 98

BRIEF OF APPELLANT

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EXHIBIT A

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	1-2
STATEMENT OF THE CASE	3-4
STATEMENT OF THE ISSUES PRESENTED	5-6
STATEMENT OF THE FACTS	7
ARGUMENT I	8-14
ARGUMENT II	15-16
ARGUMENT III	17-18
CONCLUSION	19
CERTIFICATE OF SERVICE	20

TABLE OF AUTHORITIES

CASES:	PAGE:
<u>Ala. Crim. Code, Offenses Involving Theft,</u> <u>Section 13A-8-80 through 13A-8-44, commentary</u>	10
<u>Beck vs. Alabama, 447 U. S. 626, 65 L.Ed. 2d</u> <u>100 S. Ct. 2382, 1980 (Marshall, Jr., concurring)</u>	17
<u>Beck vs. Alabama, 447 U. S. 625, 65 L. Ed. 2d</u> <u>392, 100 S. Ct. 2382 (1980), (Brennan, J.</u> <u>concurring)</u>	18
<u>Clark vs. U. S. 293 F.2d 445, C. A. Ala. (1961)</u>	13
<u>Code of Alabama, 1975, Section 13A-4-2, commentary</u>	11
<u>Code of Alabama, Section 13A-4-2 (1975)</u>	10
<u>Code of Alabama, 1975, Section 13A-8-41</u>	8
<u>Constitution of the United States,</u> <u>Amendments 8 and 14</u>	18
<u>Davis vs. State, 401 So.2d 187 (Ala. Crim. App),</u> <u>cert. denied, 401 So.2d 190, (Ala. 1981)</u>	8
<u>Deal vs. State 13 So.2d 688 (1943)</u>	13
<u>Furman vs. Georgia, 308 U.S. 238, 315-374,</u> <u>33 L. Ed.2d 346, 92 S. Ct. 2726 (1974),</u> <u>(Marshall J. concurring)</u>	17
<u>Furman vs. Georgia, 408 U.S. 238, 237,</u> <u>33 L. Ed2d 346, 92 S. Ct. 2727, (1974)</u> <u>(Brennan, J. concurring)</u>	18
<u>Gilbert vs. State 3 So.2d 95, 30 Ala. App. 214 (1941)</u>	14
<u>Gregg vs. Georgia, 428 U.S. 153, 231-241,</u> <u>449 L. Ed.2d 859, 96 S. Ct. 2909 (1976)</u> <u>(Marshall, J. Dissenting)</u>	17

<u>Godfrey vs. Georgia</u> , 446 U.S. 420, 433-442, 64 L. Ed.2d 398 100 S. Ct. 1759 (1980) (Marshall, J. concurring in Judgment)	17
<u>Huggins vs. State</u> 41 Ala. App. 548, 142 So.2d 915 cert. denied 272 Ala. 708, 145 So.2d 918, (1962)	11
<u>Model Penal Code Commentary</u> , (tentative draft No. 10) Pages 69-73	11
<u>People vs. Miller</u> 42 P.2d 3081 (Cal. 1935).	11
<u>Piano vs. State</u> 49 So. 803, 161 Ala. 38 (1909)	13
<u>Seale vs. State</u> 108 So.2d 271, 21 Ala. App. 351 (1926)	13

STATEMENT OF THE CASE

The Defendant was arrested on July 23, 1982, by the Russell County Sheriff's Deputies for a shooting in Hurtsboro (R-129). The Defendant was indicted by the Russell County Grand Jury on August 25, 1982, on the charge of Murder during Robbery First Degree (429-430). After arraignment and appointment of counsel on September 8, 1982, (434), the Defendant on September 13, 1982, filed a Motion to have Case Continued, a Motion to Suppress and a Petition for Psychiatric Examination (436-441). On September 13, 1982, the trial court denied Defendant's motion to have the case continued. Although there was a hearing on the Petition for Psychiatric Examination (444), there is no record of the proceeding included in the record on appeal. The Trial Court denied Defendant's Petition for Psychiatric Examination on September 28, 1982, (444). The hearing on the motion to suppress was continued until the date of trial.

The jury trial of the case was held on October 29, 1982, and October 30, 1982, with the jury returning a verdict of guilty of Murder during Robbery in the First Degree (462). The Defendant waived the participation of the jury in the sentence hearing (R-401) which was held on October 1, 1982, (R-404-416).

A presentence hearing was held on October 26, 1982, (R-417-420).
Sentencing was held on October 29, 1982, (R-421) wherein the
Defendant was sentenced to death by the Trial Court (R-425).
There was automatic appeal to the Court of Criminal Appeals (484).

STATEMENT OF THE ISSUES PRESENTED

ARGUMENT I. THE STATE FAILED TO MEET ITS BURDEN OF PROOF AS TO A ROBBERY.

Code of Alabama, 1975, Section 13A-8-41.

Davis vs. State 401 So.2d 187 (Ala. Crim. App), cert. denied, 401 So.2d 190, (Ala. 1981).

Ala. Crim. Code, Offenses Involving Theft, Section 13A -8-80 through 13A -8-44, commentary

Code of Alabama, Section 13A-4-2 (1975)

People vs. Miller 42 P.2d 3081 (Cal. 1935).

Huggins vs. State 41 Ala. App. 548, 142 So.2d 915 cert. denied 272 Ala. 708, 145 So.2d 918, (1962).

Model Penal Code Commentary, (tentative draft No. 10) Pages 69-73.

Code of Alabama, 1975, Section 13A-4-2, commentary.

Deal vs. State 13 So.2d 688 (1943).

Clark vs. U.S. 293 F.2d 445, C. A. Ala. (1961).

Seale vs. State 108 So.2d 271, 21 Ala. App. 351 (1926).

Piano vs. State 49 So. 803, 161 Ala. 38 (1909).

Gilbert vs. State 3 So.2d 95, 30 Ala. App. 214 (1941).

ARGUMENT III. THE DEATH PENALTY IS UNCONSTITUTIONAL.

Beck vs. Alabama, 447 U.S. 626,
65 L. Ed. 2d 100 S. Ct. 2382,
1980 (Marshall, J., concurring)

Furman vs. Georgia, 303 U.S. 238,
314-374, 33 L. Ed. 2d 346, 92 S. Ct.
2726 (1974), (Marshall J. Concurring)

Gregg vs. Georgia, 428 U.S. 153,
231-241, 449 L. Ed. 2d 859, 96 S. Ct.
2909 (1976) (Marshall, J. Dissenting)

Godfrey vs. Georgia, 446 U.S. 420,
433-442, 64 L. Ed. 2d 398 100 S. Ct.
1759. (1980) (Marshall, J. concurring
in Judgment)

Beck vs. Alabama, 447 U.S. 625, 65 L. Ed. 2d
392, 100 S. Ct. 2382 (1980), (Brennan, J.
concurring)

Gregg vs. Georgia, 428 U.S. 153, 49 L. Ed. 2d
859, 96 S. Ct. 2909 (1976) (Brennan, J.
dissenting)

Furman vs. Georgia, 408 U.S. 238, 237,
33 L. Ed. 2d 346, 92 S. Ct. 2727, (1972)
(Brennan, J. concurring)

Constitution of the United States,
Amendments 8 and 14.

STATEMENT OF THE FACTS

On July 23, 1982, at approximately 8:30 a.m., the Defendant and his companion George Warren loaded some water-melons in rural Russell County, Alabama (R-82). Later that same day, at approximately 1:30 p.m., the two travelled to the store of James T. Hughes, in Hurtsboro, Russell County, Alabama. They both entered the store and Warren bought and paid for some beer. While they were there alone with Mr. Hughes, he was fatally shot four times with a .38 caliber revolver (R-100).

No money or merchandise was stolen from the victim or his store by either the Defendant or his companion (R-272). The two left the premises in Warren's pick-up truck, and after switching vehicles with Warren's girlfriend, they were arrested by Deputies of the Russell County Sheriff's Department (R-130) in connection with the shooting (R-129).

ARGUMENT

I.

THE STATE FAILED TO MEET ITS BURDEN OF PROOF AS TO A ROBBERY.

The Defendant was charged in the indictment with causing the death of James T. Hughes while in the course of committing a theft of property from Mr. Hughes (429). The underlying charge is Robbery in the First Degree. Section 13A-8-41 Code of Alabama, 1975. In order for the Defendant to have been properly convicted as charged in the indictment, the burden of proof was on the state to show that a robbery had been committed. As disclosed by the record, this they were unable to do beyond a reasonable doubt. The three essential elements of the crime of robbery are: (1) Felonious intent; (2) Force or putting in fear as the means of effecting the intent; and (3) By that means the taking and carrying away of the personal property of another from his person or in his presence, with all three elements occurring in point of time. Davis vs. State 401 So.2d 187 (Ala. Crim. App.), cert. denied, 401 So.2d 190, (Ala. 1981).

Richard L. Roynon, Chief of Police of Hurtsboro, had no knowledge of anything being taken from the store (R-44).

George Chambliss, a customer at the store who had left just prior to the shooting (R-65) and who returned just after the shooting (R-71) did not remember if the cash register was open or closed (R-72).

John T. Smith, one of the first witnesses on the scene after the shooting (R-47), stated that no merchandise was disturbed, that he could not say that anything had been taken (R-52).

Thomas F. Boswell, Russell County Sheriff's Department did not know if any money was removed from Mr. Hughes' store (R-264) and could not testify that anything from the store was taken by the Defendant or his companion (R-272). Captain Boswell further stated that the Defendant denied taking any money from the cash register (R-278).

Joseph Michael Brundrick, one of the arresting officers (R-146), could not identify any property found on the Defendant as being taken from Mr. Hughes' store (R-148).

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The Defendant, on the tape that was entered into evidence as State's Exhibit No. 25-A, stated that his companion, George Warren, actually paid for a purchase at the store (R-189), and that they did not take any other property from Mr. Hughes' store

(R-191). In addition, the Defendant in a statement marked as State's Exhibit 24, when asked if he got any money out of the register or off of Mr. Hughes' body, replied "no, I didn't" (R-295).

Raymond B. Smith, Russell County Sheriff's Department, testified that after the shooting Mr. Hughes had \$150.00 in cash in his wallet and \$23.69 in his front pocket (R-282). Officer Smith further testified that there was an additional \$655.98 in the cash register after the shooting (R-284).

The Defendant in his statement marked as State's Exhibit No. 23, stated that he did not intend to rob Mr. Hughes, he just pulled the pistol and shot him (R-256). The violence used or threatened must be for the purpose of accomplishing a theft. Violence used or threatened for some purpose unrelated to theft is a separate offense against the person. Ala. Crim. Code, Offenses Involving Theft, Section 13A -8-80 through 13A -8-44, commentary. There was no intent to commit robbery as per the 1975 Code of Alabama, Section 13A-4-2, so the only intent that could be reasonably argued would be the shooting.

There is no evidence of any plan or scheme to commit any robbery before the shooting, nor any evidence of any theft after the shooting. The victim was alone in his store, and after he became incapacitated, there were no intervening circumstances to prevent the Defendant from committing a theft if that had been his intention. In order to be guilty of the underlying charge by way of an attempt, the attempt must be in such progress that it

will be consummated unless interrupted by circumstances independent of the will of the attempter. People vs. Miller 42 P.2d 3081 (Cal. 1935). Remote preparatory acts reasonably in a chain of causation do not constitute an attempt. Huggins vs. State 41 Ala.App. 548, 142 So.2d 915 cert. denied 273 Ala.708, 145 So.2d 918, (1962). In cases where the actor has gone beyond the line drawn for preparation, indicating prima facie sufficient firmness of purpose, he should be allowed to rebut such a conclusion by showing that he has plainly demonstrated his lack of firm purpose by completely renouncing his purpose to commit the crime. Model Penal Code Commentary, (tentative draft No. 10) Pages 69-73.

Even if there could possibly be an interpretation of the facts which shows an intent to rob, the evidence is clear that there would have been a complete and voluntarily abandonment of any such intent. Even where Defendant has proceeded far towards commission of the contemplated crime, complete and voluntary abandonment should be allowed as a defense to an attempt in order to encourage desistance and to diminish the risk that the substantive crime will be committed. Code of Alabama, 1975, Section 13A-4-2, commentary. The three essential elements of the crime of robbery are:

(1) Felonious intent; (2) Force or putting in fear as the means of effecting the intent; and (3) By that means the taking and carrying away of the personal property of another from his person or in his presence, with all three elements occurring in point of time.

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The Defendant in his trial testimony, stated that he had no plan to rob Mr. Hughes, did not take anything out of the cash register and did not bring anything else out of the store (R-325). If in all of the Defendant's confessions which were admitted into evidence, he told in detail about the shooting, then it would seem logical that if he robbed the victim or even intended to rob the victim, that he would freely admit such in his confessions. Yet, he never expressed in any confession admitted as an Exhibit that it was his intention to rob Mr. Hughes.

There is no direct evidence of any theft of property. There is no direct evidence of any robbery. There is only mere speculation that robbery was the motive. The Detectives inquired as to other motives for the killing, such as a hired killing, (R-210) evidently because there was no sign of any robbery or attempted robbery. Indeed, the pertinent facts regarding a lack of a robbery are as follows:

- a. Nothing was taken from the store after the shooting.
- b. The cash register and the victim's pockets were full of money.
- c. No merchandise was missing.
- d. No contraband was found on the Defendant or his companion at the time of his arrest.

Speculation or mere suspicion that robbery may have been a motive without any corroborating evidence is not sufficient to support a robbery conviction. Where conviction is sought upon circumstantial evidence, the state has the burden of showing beyond all reasonable doubt to the exclusion of every reasonable hypothesis except that of accused's guilt every circumstance necessary to show that accused is guilty. Deal vs. State 13 So.2d 688 (1943). Where evidence raises a mere suspicion, or, admitting all it tends to prove, accused's guilt is left in uncertainty or dependent upon conjuncture or probability, court should instruct jury to acquit. Deal vs. State 13 So.2d 688 (1943). In reviewing the sufficiency of evidence to justify a finding of guilt beyond a reasonable doubt in a circumstantial evidence case, the test the Appellate Court is to apply is whether the jury might reasonably find the evidence excluded every reasonable hypothesis except that of guilty. Clark vs. U.S. 293 F.2d 445, C. A. Ala. (1961). Burden is never on accused to establish innocence, or disprove facts necessary to establish offense charged. Seale vs. State 108 So.2d 271, 21 Ala. App. 351 (1926). The state must prove beyond a reasonable doubt every material ingredient of the crime charged. Piano vs. State 49 So. 803, 161 Ala. 88 (1909). The burden is upon the State, and the State must show beyond all reasonable doubt and to the exclusion

of every other reasonable hypothesis, every circumstance necessary to show that Defendant is guilty and unless the State has done so, a verdict of not guilty should be rendered. Gilbert vs. State 3 So.2d 95, 30 Ala. App. 214 (1941).

ARGUMENT

II.

THE SENTENCE OF DEATH WAS NOT PROPER.

The sentence of death was imposed under the influence of passion and prejudice. The jury was unduly prejudiced by the actions of the victim's widow. Mrs. Hughes was crying and sobbing and jurors were disturbed by her actions (R-36). Over defendant's objections, Mrs. Hughes was allowed to remain in the courtroom to further play upon the passion and prejudice of the jury.

Upon an independent weighing of the aggravating and mitigating circumstances, it is clear that the mitigating circumstances outweigh the aggravating circumstance. The trial court set forth as the sole aggravating circumstance that the capital offense was committed while the defendant was engaged in an attempt to commit a robbery (R-423). However, the State failed to meet its burden of proof as to the robbery (See Argument No. 1). Because the one aggravating circumstance cited by the Court was not supported by the evidence, the mitigating circumstances necessarily outweigh the aggravating circumstance and, therefore, the sentence of death is improper.

The sentence of death in this case is excessive and disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

ARGUMENT

III.

THE DEATH PENALTY IS UNCONSTITUTIONAL.

The death penalty is a cruel and unusual punishment prohibited by the 8th and 14th Amendments to the Constitution of the United States. Death as a penalty for a crime is not only excessive, but it is morally unacceptable. Beck vs. Alabama, 447 U.S. 626, 65 L. Ed. 2d, 392, 100 S. Ct. 2382, (1980) (Marshall, J., concurring); Furman vs. Georgia, 408 U.S. 238, 314-374, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972), (Marshall, J. concurring), Gregg vs. Georgia, 428 U.S. 153, 231-241, 449 Lawyers Edition 2d. 859, 96 S. Ct. 2909 (1976) (Marshall, J. dissenting); Godfrey vs. Georgia, 446 U.S. 420, 433-442, 64 Lawyers Ed. 2d. 398 100 S. Ct. 1759 (1980) (Marshall, J. concurring in Judgment).

The law has progressed to the point where the Court should declare that the punishment of death, like punishment on the rack, the screw and the wheel, is no longer morally tolerable in our civilized society. The State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings. A punishment must not be so severe as to be degrading to human dignity. Death is not only an unusually severe punishment, unusual in its pain, in its finality, and in its enormity, but it serves no penal purpose more effectively than a less

severe punishment; therefore, the principle inherent in the Clause that prohibits pointless infliction of excessive punishment when less severe punishment can adequately achieve the same purposes invalidates the punishment. The death sentence is violatative of the 8th and 14th Amendments. Beck vs. Alabama, 447 U.S. 625, 65 L. Ed. 2d 392, 100 S. Ct. 2382 (1980), (Brennan, J., concurring); Gregg vs. Georgia, 428 U.S. 153, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976) (Brennan, J. dissenting); Furman vs. Georgia 408 U.S. 238, 237, 33 L. Ed. 2d 346, 92 S. Ct. 2726, (1972) (Brennan, J. concurring).

CONCLUSION

The State of Alabama failed to meet its burden of proof in that it failed to prove beyond a reasonable doubt that the Defendant committed a robbery. Of the many witnesses who testified against the Defendant, not one of them stated that any merchandise was missing from the store, or that any money or other property was taken from the victim or from his possession. There was no stolen property found on the Defendant or his companion at the time of their arrest. In all the many statements made by the Defendant and admitted against him at trial, although he apparently admitted his participation in the shooting, he at all times denied a robbery or attempted robbery. The burden is on the State to show beyond all reasonable doubt and to the exclusion of every other reasonable hypothesis, every circumstance necessary to show that the Defendant is guilty, and unless the State has done so, a verdict of not guilty should be rendered.

The jury was unduly prejudiced by the emotional outburst of the victim's widow, the mitigating circumstances outweighed the aggravating circumstance and the sentence of death was excessive and disproportionate to the penalty imposed in similar cases.

The death penalty is a cruel and unusual punishment prohibited by the 8th and 14th Amendments to the Constitution of the United States.

The Defendant requests that his conviction in the lower court be reversed.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Brief upon the Clerk of the Court of Criminal Appeals and to the Attorney General of the State of Alabama, by depositing a copy of the same, postage prepaid, certified mail, return receipt requested and properly addressed to:

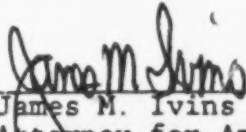
Hon. Mollie Jordan
Clerk, Court of Criminal Appeals
P. O. Box 351
Montgomery, Alabama 36101

Hon. Charles Graddick
Attorney General
64 North Union Street
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Montgomery, Alabama 36130

This the 14th day of December, 1982.

CORNETT, PERDUE & IVINS

By: _____


James M. Ivins
Attorney for Appellant
1408 Broad Street
Post Office Box 88
Phenix City, Alabama 36867
(205) 298-0607

IN THE SUPREME COURT
STATE OF ALABAMA

JOHNNY LUKE,

Appellant

vs.

THE STATE OF ALABAMA,

Appellee

CASE NO. _____

BRIEF OF APPELLANT

James M. Ivins
CORNETT, PEEDUE & IVINS
P. O. Box 88
1408 Broad St.
Phenix City, Al. 36867

Attorney for Appellant

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	1-2
STATEMENT OF THE CASE	3-4
STATEMENT OF THE ISSUES PRESENTED	5-6
STATEMENT OF THE FACTS	7
ARGUMENT I	8-14
ARGUMENT II	15-16
ARGUMENT III	17-18
CONCLUSION	19
CERTIFICATE OF SERVICE	20

TABLE OF AUTHORITIES

CASES:	PAGE:
<u>Ala. Crim. Code, Offenses Involving Theft,</u> <u>Section 13A-8-80 through 13A-8-44, commentary</u>	10
<u>Beck vs. Alabama, 447 U. S. 626, 65 L.Ed. 2d</u> <u>100 S. Ct. 2382, 1980 (Marshall, Jr., concurring)</u>	17
<u>Beck vs. Alabama, 447 U. S. 625, 65 L. Ed. 2d</u> <u>392, 100 S. Ct. 2382 (1980), (Brennan, J.</u> <u>concurring)</u>	18
<u>Clark vs. U. S. 293 F.2d 445, C. A. Ala. (1961)</u>	13
<u>Code of Alabama, 1975, Section 13A-4-2, commentary</u>	11
<u>Code of Alabama, Section 13A-4-2 (1975)</u>	10
<u>Code of Alabama, 1975, Section 13A-8-41</u>	8
<u>Constitution of the United States,</u> <u>Amendments 8 and 14</u>	18
<u>Davis vs. State, 401 So.2d 187 (Ala. Crim. App),</u> <u>cert. denied, 401 So.2d 190, (Ala. 1981)</u>	8
<u>Deal vs. State 13 So.2d 688 (1943)</u>	13
<u>Furman vs. Georgia, 308 U.S. 238, 315-374,</u> <u>33 L. Ed.2d 346, 92 S. Ct. 2726 (1974),</u> <u>(Marshall J. concurring)</u>	17
<u>Furman vs. Georgia, 408 U.S. 238, 237,</u> <u>33 L. Ed2d 346, 92 S. Ct. 2727, (1974)</u> <u>(Brennan, J. concurring)</u>	18
<u>Gilbert vs. State 3 So.2d 95, 30 Ala. App. 214 (1941)</u>	14
<u>Gregg vs. Georgia, 428 U.S. 153, 231-241,</u> <u>449 L. Ed.2d 859, 96 S. Ct. 2909 (1976)</u> <u>(Marshall, J. Dissenting)</u>	17

<u>Godfrey vs. Georgia</u> , 446 U.S. 420, 433-442, 64 L. Ed.2d 398 100 S. Ct. 1759 (1980) (Marshall, J. concurring in Judgment)	17
<u>Huggins vs. State</u> 41 Ala. App. 548, 142 So.2d 915 cert. denied 272 Ala. 708, 145 So.2d 918, (1962)	11
<u>Model Penal Code Commentary</u> , (tentative draft No. 10) Pages 69-73	11
<u>People vs. Miller</u> 42 P.2d 3081 (Cal. 1935).	11
<u>Piano vs. State</u> 49 So. 803, 161 Ala. 38 (1909)	13
<u>Seale vs. State</u> 108 So.2d 271, 21 Ala. App. 351 (1926)	13

STATEMENT OF THE CASE

The Defendant was arrested on July 23, 1982, by the Russell County Sheriff's Deputies for a shooting in Hurtsboro (R-129). The Defendant was indicted by the Russell County Grand Jury on August 25, 1982, on the charge of Murder during Robbery First Degree (429-430). After arraignment and appointment of counsel on September 8, 1982 (434), the Defendant on September 13, 1982, filed a Motion to have case continued, a Motion to Suppress and a Petition for Psychiatric Examination (436-441). On September 13, 1982, the trial court denied Defendant's motion to have the case continued. Although there was a hearing on the Petition for Psychiatric Examination (444), there is no record of the proceeding included in the record on appeal. The Trial Court denied Defendant's Petition for Psychiatric Examination on September 28, 1982. (444). The hearing on the Motion to Suppress was continued until the date of trial.

The jury trial of the case was held on September 29, 1982, and September 30, 1982, with the jury returning a verdict of guilty of Murder during Robbery in the First Degree (462). The Defendant waived the participation of the jury in the sentence hearing (\$-401) which was held on October 1, 1982, (R-404-416). A presentence hearing was held on October 26, 1982 (R-417-420). Sentencing was held on October 29, 1982, (R-421) wherein the Defendant was sentenced to death by the Trial Court (R-425). There was automatic appeal to the Court of Criminal Appeals (484).

The Court of Criminal Appeals affirmed Petitioner's conviction on March 1, 1983. An application for rehearing was filed on March 14, 1983, and overruled on March 29, 1983.

STATEMENT OF THE ISSUES PRESENTED

ARGUMENT I. THE STATE FAILED TO MEET ITS BURDEN OF PROOF AS TO A ROBBERY AND THE COURT OF CRIMINAL APPEALS FAILED TO RECOGNIZE AND FOLLOW THE ALABAMA LEGAL PRECEDENTS IN THIS ISSUE.

Code of Alabama, 1975, Section 13A-8-41.

Davis vs. State 401 So.2d 187 (Ala. Crim. App), cert. denied, 401 So.2d 190, (Ala. 1981).

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65 L. Ed. 2d 100 S. Ct. 2382,
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Code of Alabama, 1975, Section 13A-4-2

STATEMENT OF THE FACTS

On July 23, 1982, at approximately 8:30 a.m., the Defendant and his companion George Warren loaded some water-melons in rural Russell County, Alabama (R-82). Later that same day, at approximately 1:30 p.m., the two travelled to the store of James T. Hughes, in Hurtsboro, Russell County, Alabama. They both entered the store and Warren bought and paid for some beer. While they were there alone with Mr. Hughes, he was fatally shot four times with a .38 caliber revolver (R-100).

No money or merchandise was stolen from the victim or his store by either the Defendant or his companion (R-272). The two left the premises in Warren's pick-up truck, and after switching vehicles with Warren's girlfriend, they were arrested by Deputies of the Russell County Sheriff's Department (R-130) in connection with the shooting (R-129).

ARGUMENT

I.

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- a. Nothing was taken from the store after the shooting.
- b. The cash register and the victim's pockets were full of money.
- c. No merchandise was missing.
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of every other reasonable hypothesis, every circumstance necessary to show that Defendant is guilty and unless the State has done so, a verdict of not guilty should be rendered. Gilbert vs. State 3 So.2d 95, 30 Ala. App. 214 (1941).

The facts do not support a conviction of a capital offense. There is no direct evidence of a theft of property from the victim. There was also no direct evidence that the victim was shot "in the course of committing a theft" as defined by the statute.

The trial court made a "finding the fact" which was adopted by the Court of Criminal Appeals. The Trial Court's finding of fact was not correct and should not be used as the basis of affirming appellant's conviction. Determining the facts is a function for the jury. The Appellate Court has a duty to review the facts by examining the record of the trial proceedings and not by merely adopting the trial court's rendition of the evidence.

ARGUMENT

II.

THE SENTENCE OF DEATH WAS NOT PROPER AND THE APPELLATE COURT ERRED IN REFUSING TO OVERTURN THE CONVICTION.

The sentence of death was imposed under the influence of passion and prejudice. The Jury and the Judge were both unduly prejudiced by the actions of the victim's widow. Mrs. Hughes was crying and sobbing and the jurors and the Court were disturbed by her actions (R-36). Over Defendant's objections, Mrs. Hughes was allowed to remain in the Courtroom to further play upon the passion and prejudice of the Jury and of the Court.

Upon an independent weighing of the aggravating and mitigating circumstances, it is clear that the mitigating circumstances outweigh the aggravating circumstance. The trial court set forth as the sole aggravating circumstance that the capital offense was committed while the defendant was engaged in an attempt to commit a robbery (R-423). However, the State failed to meet its burden of proof as to the robbery (See Argument No. 1). Because the one aggravating circumstance cited by the Court was not supported by the evidence, the mitigating circumstances necessarily outweigh the aggravating circumstance and, therefore, the sentence of death is improper.

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III.

THE DEATH PENALTY IS UNCONSTITUTIONAL.

The death penalty is a cruel and unusual punishment prohibited by the 8th and 14th Amendments to the Constitution of the United States. Death as a penalty for a crime is not only excessive, but it is morally unacceptable. Beck vs. Alabama, 447 U.S. 626, 65 L. Ed. 2d, 392, 100 S. Ct. 2382, (1980) (Marshall, J., concurring); Furman vs. Georgia, 408 U.S. 238, 314-374, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972), (Marshall, J. concurring), Gregg vs. Georgia, 428 U.S. 153, 231-241, 449 Lawyers Edition 2d. 859, 96 S. Ct. 2909 (1976) (Marshall, J. dissenting); Godfrey vs. Georgia, 446 U.S. 420, 433-442, 64 Lawyers Ed. 2d. 398 100 S. Ct. 1759 (1980) (Marshall, J. concurring in Judgment).

The law has progressed to the point where the Court should declare that the punishment of death, like punishment on the rack, the screw and the wheel, is no longer morally tolerable in our civilized society. The State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings. A punishment must not be so severe as to be degrading to human dignity. Death is not only an unusually severe punishment, unusual in its pain, in its finality, and in its enormity, but it serves no penal purpose more effectively than a less

severe punishment; therefore, the principle inherent in the Clause that prohibits pointless infliction of excessive punishment when less severe punishment can adequately achieve the same purposes invalidates the punishment. The death sentence is violatative of the 8th and 14th Amendments. Beck vs. Alabama, 447 U.S. 625, 65 L. Ed. 2d 392, 100 S. Ct. 2382 (1980), (Brennan, J., concurring); Gregg vs. Georgia, 428 U.S. 153, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976) (Brennan, J. dissenting); Furman vs. Georgia, 408 U.S. 238, 237, 33 L. Ed. 2d 346, 92 S. Ct. 2726, (1972) (Brennan, J. concurring).

The Code of Alabama, 1975, Section 13A-4-2 directs a lesser punishment for an attempt than for the commission of the uncompleted underlying charge. Assuming that the underlying charge was a Class A Felony, then punishment for an attempt thereof could not be greater than a Class B Felony, or 2 to 20 years. In effect, the Appellant has been sentenced to death for a charge that would ordinarily be punishable for a term not to exceed 20 years. Therefore, in this case, the death penalty is a cruel and unusual punishment prohibited by the 8th and 14th Amendments to the Constitution of the United States.

CONCLUSION

The State of Alabama failed to meet its burden of proof in that it failed to prove beyond a reasonable doubt that the Defendant committed a robbery. Of the many witnesses who testified against the Defendant, not one of them stated that any merchandise was missing from the store, or that any money or other property was taken from the victim or from his possession. There was no stolen property found on the Defendant or his companion at the time of their arrest. In all the many statements made by the Defendant and admitted against him at trial, although he apparently admitted his participation in the shooting, he at all times denied a robbery or attempted robbery. The burden is on the State to show beyond all reasonable doubt and to the exclusion of every other reasonable hypothesis, every circumstance necessary to show that the Defendant is guilty, and unless the State has done so, a verdict of not guilty should be rendered.

The Jury and the Trial Court were both unduly prejudiced by the emotional outburst of the victim's widow, the mitigating circumstances outweighed the aggravating circumstances and the sentence of death was excessive and disproportionate to the penalty imposed in similar cases.

The death penalty is a cruel and unusual punishment prohibited by the 8th and 14th Amendments to the Constitution of the United States.

The Defendant requests that his conviction in the lower court be reversed.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Brief upon the Supreme Court, State of Alabama, Clerk of Criminal Appeals and to the Attorney General of the State of Alabama, by depositing a copy of same, postage prepaid, certified mail, return receipt requested and properly addressed to:

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This the 31st day of March, 1983.

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